FILE COPY

Office Supreme Court, U. S.
FILED
SEP 16 1935
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1935

No. 24

NANCY K. McFEELY, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

BRIEF FOR PETITIONER.

G. F. SNYDER,
707 Colorado Building,
Washington, D. C.

H. B. WASSELL,
3106 Grant Building,
Pittsburgh, Pa.,
Attorneys for Petitioner.

SMITH BROS. CO. INC., LAW PRINTERS, 209-213 GRANT STREET, PITTSBURGH, PA.

SUBJECT INDEX.

PAGE

Opinions of the Courts Below 1
Statement of the Case 1
Specifications of Errors to be Urged 4
Summary of Argument 5-a
Questions Involved 6
Argument 7
Property Defined 7
Property as construed by Pennsylvania law ... 8
Revenue Act of 1928 as construed 12
Determination that date which governs for gain or loss must be used in fixing date of acquisition for capital gain purposes is in error 16
Determination that basis for determining capital gain is limited by Section 113 to date of distribution is in error 33
Determination that capital gain from capital assets is reduced to ordinary net income because change of basis of gain or loss sets date over two years after actual acquisition is in error 45
Holding period begins at date of decedent's death. Basis for amount of gain is time of distribution 50
In case of doubt taxing statutes construed in favor of the citizen 60
Capital gain tax statutes not to be narrowly construed 60
Conclusion 60
Appendix 62

TABLE OF CASES.

	PAGE
Abbott's Executor v. Reeves et al., 49 Pa. 494	9
Abeles v. Commissioner, 24 B. T. A. 435	24
Barber v. Commissioner, 25 B. T. A. 513	25
Brewster v. Gage, 280 U. S. 327	22, 31, 40
Buchanan v. Worley, 245 U. S. 60	7
Chandler v. Field, 63 F. (2d) 13	24
DeGanay v. Lederer, 250 U. S. 376	41
Dibblee v. Helvering, 75 F. (2d) 617	35-40
Affirming 29 B. T. A. 1070	35
Dunigan v. Burnett, 66 F. (2d) 201	21
Evan's Estate, 150 Pa. 212	31
First National Bank of Boston et al. v. United States, 76 Fed. (2d) 200, reversing D. C. of Mass., 7 F. Supp. 915	15, 18, 27, 51 to 57
Gould v. Gould, 245 U. S. 151	60
Greiner's Appeal, In re, 103 Pa. 89	8, 22, 25
Griscom v. Commissioner, 22 B. T. A. 979	25
Harmel v. Commissioner, 56 F. (2d) 153	8, 24, 42
Helvering v. Bliss, 293 U. S. 144	31, 60
Helvering v. N. Y. Tr. Co., 292 U. S. 455	18, 19, 22-46
Hood v. Maires, 255 Pa. 128	10
Hooper v. Commissioner, 26 B. T. A. 758	21
Jenning's Estate, 266 Pa. 60	10
Johnson v. Commissioner, 52 F. (2d) 726	14
Johnson v. Commissioner, 56 F. (2d) 58	8, 42
Lee v. Helvering, 76 F. (2d) 203, reversing unpublished memo. opinion Board of Tax Appeals, Docket No. 65705 (R. 60)	50, 51
Long's Est., 228 Pa., 594	10
McKinney v. United States, 62 Ct. Cl. 180	17
Ogle v. Helvering, 77 F. (2d) 338, C. C. H. '35, Vol. 3, Par 9366	37
Richardson's Est., 236 Pa. 136	10
Roberts v. Messinger, 134 Pa. 298	9

PAGE

Security Trust Co. v. Commissioner, 25 B. T. A. 29, aff. 65 F. (2d) 877 25
Shaffer v. Commissioner, 28 B. T. A. 1294..... 21
Shoenberger v. Burnett, 55 F. (2d) 543..... 14
United States v. Dakota-Montana Oil Co., 288 U. S. 459 31
Walworth v. Abel, 52 Pa. 370..... 9
Whelen v. Phillips, 151 Pa. 312..... 10

STATUTES.

Relevant Sections.

Revenue Act of 1928, 45 Stat. 791.....12, 62, 63
Revenue Act of 1926, 44 Stat. 9.....64, 65
Revenue Act of 1924, 43 Stat. 253..... 65
Revenue Act of 1921, 42 Stat. 227..... 66

MISCELLANEOUS.

Income Tax Ruling, 1889 III I. C. B. 70.....25 to 30
Report 960, Senate Com. on Finance Internal Revenue Bill of 1[illegible] 17-67
Report No. 1882, [illegible]erence Com. on Revenue Bill of 1928 17-68-69
Report Senate Committee on Finance on 1934 Revenue Bill 70
Report No. 52, Senate Committee on Finance on the Internal Revenue Bill of 1926.....20-71
Report No. 356, Conference Report on Revenue Bill of 1926 20-72

IN THE

Supreme Court of the United States

NO. 24 OCTOBER TERM, 1935

NANCY K. McKEELY, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

BRIEF FOR PETITIONER.

OPINIONS OF COURTS BELOW.

The opinion of the Board of Tax Appeals, (R. 23) is reported in 29 B. T. A. 998. The *per curiam* opinion of the Circuit Court of Appeals for the Third Circuit, (R. 56) is reported in 74 F. (2d) 1017 (C.C.A. 3).

STATEMENT OF THE CASE.

This is a petition by Nancy K. McFeely, a resident of Latrobe, Pennsylvania, hereinafter referred to as the petitioner, for review of the decision of the Circuit Court of Appeals for the Third Circuit (R. 57) affirming the judgment of the Board of Tax Appeals (R. 28-29), that the profit realized by the petitioner from the sale of 1000 shares of Radio A common stock on March 14, 1929, was ordinary net profit instead of capital net gain and that there was a deficiency of $35,372.53 in her income tax for 1929.

The facts are set forth in full under the Stipulation (R. 34) and in the opinion of the Board of Tax Appeals (R. 16).

The petitioner was the owner of the 1000 shares of Radio A common stock which she acquired as a gift from her mother, Martha A. Given. The stock had been a part of the estate of Mrs. Given's husband prior to his death.

T. H. Given died in 1919, and no provision having been made in his will for his wife, Martha A. Given, she elected to take one-half of his estate, pursuant to the law of Pennsylvania, in lieu of dower.

In 1924, Mrs. Given made a written assignment in trust for the petitioner of ten per cent. of her undistributed one-half interest in her husband's estate and in 1925 this gift was made absolute. The gift was reported and a gift tax of $2,417.90 was paid thereon. (R. 35).

In 1925 the Executors of T. H. Given filed a second and partial account and a sworn statement at the audit that all creditors had been paid; that all the parties in interest had elected to take in kind the stocks, bonds and cash to be distributed and that they had agreed that a portion of the securities and cash should be held by the Executors and distribution suspended (R. 35-36). Certain stocks were distributed under a decree at this audit which are not material to this issue.

On November 3, 1927, pursuant to a further decree of distribution the petitioner received from the Executors among other assets certificates for 1000 shares of Radio A common stock.

On March 14, 1929, she sold the Radio stock for $484,460.00. This stock had been valued for gift tax purposes as of June 23, 1924, at $20,625.00.

In March, 1930, petitioner filed her 1929 Income Tax Report claiming and reporting $394,685.00 as capital net gain, including, *inter alia*, the profit on the sale of

the Radio A common stock, upon which she paid a capital gain tax of $49,335.63 (R. 37).

The Commissioner of Internal Revenue determined that there was an ordinary profit of $404,085. on the sale of 1000 shares of Radio A common stock, instead of a capital net gain, upon the theory that the Radio stock sold was not property acquired by the petitioner until delivery on November 3, 1927, by the executors, because the date which governs for gain or loss purposes under Section 113 (a) (2) for her donor must be used as the date for determining what constitues "capital assets" and "capital net gain" under Sec. 101 (c) (8) (B) for the donee, and it would be inconsistent to hold that the stock was in the donor's hands prior to November 3, 1927. Therefore, since the stock was sold on March 14, 1929, not having been held by the petitioner nor her donor for a period of two years from November 3, 1927, the profit could not be considered capital net gain but would be subject to both normal tax and surtax (R. 13-14).

The Commissioner in his letter of final determination of petitioner's tax liability for the year 1929, found a deficiency of $35,372.53 (R. 9).

The petitioner appealed from this determination in a petition filed with the Board of Tax Appeals on January 24, 1933 (R. 2).

The Board of Tax Appeals on February 6, 1934, in its opinion filed (R. 56) sustained the Commissioner's determination and ordered and decided that there was a deficiency of $35,372.53 for the year 1929, and entered judgment for respondent.

The petitioner on April 23, 1934, filed her petition for review by the Circuit Court of Appeals for the Third Circuit (R. 30), which court on December 10, 1934, in a *per curiam* opinion (R. 56) also sustained respondent's

determination and affirmed the judgment of the Board of Tax Appeals.

The petition for certiorari was filed April 16, 1935 in this Court and certiorari granted May 20, 1935.

From this decision the petitioner requests this Honorable Court to review the Record and the proceedings to the end that the judgment may be reversed and that your petitioner may have such other and further relief as may seem meet and just.

SPECIFICATION OF ERRORS TO BE URGED.

FIRST. The Circuit Court of Appeals erred in affirming the judgment of the Board of Tax Appeals.

SECOND. The Circuit Court of Appeals erred in affirming the Board of Tax Appeals in the first assignment of error, to-wit:

> (1) The determination that the profit realized by the Petitioner from the sale of 1000 shares of Radio "A" common stock was "ordinary net income" and not "capital net gain."

THIRD. The Circuit Court of Appeals erred in affirming the Board of Tax Appeals in the second assignment of error, to-wit:

> (2) The determination that capital gain from the sale of capital assets under the requirements of Section 101 is reduced to "ordinary net income" because the basis of determining the gain as prescribed in Section 113 (a) (5) sets a date over two years after the date of actual acquisition of the capital assets.

FOURTH. The Circuit Court of Appeals erred in affirming the Board of Tax Appeals in the third assignment of error, to-wit:

(3) The determination that the date which governs for gain or loss purposes in Section 113 (a) (5) of the Revenue Act of 1928 must be used in fixing the date of acquisition for capital gain determination under Section 101 (8) of said Act, thereby voiding any previous holding period.

FIFTH. The Circuit Court of Appeals erred in affirming the Board of Tax Appeals in the fourth assignment of error, to-wit:

(4) The determination that the petitioner's basis for "capital gain or loss" in the sales in question was limited, reduced and restricted by Section 113 (a) (5) of the Revenue Act of 1928, and that November 3, 1927, is the date which governs the determination of capital net gain or loss.

SIXTH. The Circuit Court of Appeals erred in affirming the Board of Tax Appeals in the eighth assignment of error, to-wit:

(8) The finding of the deficiency for the year 1929 of $35,372.53, in lieu of a determination that there was no additional income tax due from the petitioner for the year in controversy.

SUMMARY OF ARGUMENT.

Property held for more than two years from the time it is acquired under the laws prevailing in the state in which the taxpayer resides qualifies as "capital assets," as defined in Section 101 of the Revenue Act of 1928.

The two year tenure begins at the time of acquisition of title, even though the property is not reduced to physical possession.

In the 1921 Act, Section 206 (a) (6), it was provided that to constitute capital assets property must be acquired and held for two years. In subsequent acts the word "acquired" has been omitted, the obvious reason is that the word "acquired" was surplusage, since in general, property is held from the time it is acquired or one's ownership begins. (*First National Bank of Boston v. United States,* 76 Fed. 200.) p. 18.

The provisions of the 1926 Act were reenacted as Sections 101 and 168 in the 1928 Act and no change has been made in the meaning of the definition of "capital assets" since the 1921 Act.

The Commissioner, the Board of Tax Appeals and the Circuit Court of Appeals have repeatedly decided in cases arising prior to the Act of 1928 that the two year period begins to run from the date of taxpayer's acquisition of the property and this is the first case under the 1928 Act, or any other act, in which the Commissioner has decided that the two year period starts from the date of possession and not from the time of acquisition of title.

Section 113 of the Revenue Act of 1928 changed the basis for gain or loss on certain property acquired by will or intestacy to time of distribution.

Respondent, on account of this change in the basis for gain or loss, held that while certain stock certificates

were in the hands of the executors they were not in any proper sense "held" by the petitioner, and therefore, she could not be said to have held them as "capital assets" under Section 101 for a period of more than two years from the time of distribution when sold. Respondent thus in interpreting this change contends that Section 101 was inferentially changed and that Congress intended to provide that when certain property is acquired by will or intestacy it is acquired at time of distribution, instead of at date of death as uniformly held by the laws of the States.

Congress cannot legally define time of acquisition contrary to laws prevailing in the States. Physical possession has never been considered an essential element for capital gain determination.

Under the laws of Pennsylvania, the property in controversy vested in the donor at the death of her husband in 1919, and vested in the petitioner as donee not later than 1925, subject to the payment of his debts and administration expenses, which were paid prior to the date of distribution in 1925. Delivery of the particular certificates was postponed until a later decree of distribution on November 3, 1927. No new right was acquired by delivery and legal title relates back to the date of death in the hands of the donor and to the date of the gift in the hands of the petitioner as donee. (*Brewster v. Gage,* 280 U. S. 327.) The property was held by the taxpayer for more than two years from time of acquisition.

The petitioner sold the stock on March 14, 1929, almost ten years after the date of death and over four years from the date of gift at a profit which qualifies as capital gain under the provisions of Section 101, the amount of her gain to be computed under the changed basis for gain or loss, as set up in Section 113.

STATEMENT OF QUESTIONS INVOLVED.

First. Under the Revenue Act of 1928, in determining capital gain on property sold by a general beneficiary of an estate, does the holding period begin when acquired at decedent's death or when reduced to possession at the time of distribution?

Second. Is a donee, who has held gift property for more than two years from the date of gift, deprived of her capital gain privilege upon its sale because the gain and loss provisions of the Revenue Act of 1928 establish her basis for gain or loss at a date after the gift and less than two years from the date of sale?

Petitioner's Contention.

Petitioner contends that she acquired the property in question by gift from her widowed mother; that the right to delivery by distribution in the course of administration was incidental to the property acquired by gift; and that the property sold was property held by her for more than two years from the time of gift, and therefore her profit was capital gain.

Respondent's Contention.

Respondent contends that petitioner's holding period of over two years from the date of gift to time of distribution could not be recognized for capital gain purposes, because under the Revenue Act of 1928 her basis for gain or loss as donee was the same as that of her mother as donor; that this basis was the time of distribution; that neither petitioner nor her mother could be said to hold the property sold before the time of distribution; that this date was less than two years from the date of sale; therefore her profit on the sale was not capital gain.

ARGUMENT.

PROPERTY DEFINED.

We have first to determine whether petitioner held property within the meaning of the Revenue Act of 1928. This Act does not define property and does not limit the term in any way. It must, therefore, be considered to be used in its general sense and as construed by the law of the State.

The term property is employed to signify any valuable right or interest protected by law and the subject matter or things in which rights or interests exist. *50 C. J.* 729.

In *Buchanan v. Worley,* 245 U. S. 60, Mr. Justice Day said (P. 74):

> "Property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use and dispose of it. The Constitution protects these essential attributes of property. * * * Property consists of the free use, enjoyment and disposal of a person's acquisitions without control or domination save by the law of the land. *1 Blackstone Commentaries* (Cooley's Ed.) 127.

To acquire means to obtain, to get as one's own, to get or gain by some lawful title. In its primary sense to get as owner. In its broader sense to obtain in any manner, to gain by any means. Thus the word includes to take by descent or distribution, by purchase or under a will. *1 C. J.* 908.

As equitable interests can be acquired, used and disposed of, they are property to the same extent as any other acquisition and become one's property as soon as acquired.

The power to make laws governing acquisition and disposition of property is vested in the States. The State laws determine what is property, determine when it is acquired, regulate its use, provide for its transfer by sale or gift by the living or by bequest, devise or intestacy at death.

Rules of property prevailing in the States must be recognized for Federal income tax purposes. *Harmel v. Commissioner* 56 F. (2) 153; *Johnson v. Commissioner* 56 F. (2) 58.

Under the broad powers of the Sixteenth Amendment, Congress has been authorized by law to lay and collect taxes on incomes from whatever source derived, and can define what is income from property and what part of the income shall be taxed, but it has no power to define the elementary rules of property contrary to the rules existing in the States.

THE PROPERTY AS CONSTRUED BY PENNSYLVANIA LAW.

The property in question was a part of the Estate of T. H. Given, of Pittsburgh, Pennsylvania, at the time of his death on June 28, 1919. It became a part of the interest of his widow, who elected at his death to take one-half of his estate against his will under the statutes of Pennsylvania.

In *Greiner's Appeal,* 103 Pa. 89, it is held that the election which she made vested in her immediately and absolutely one-half of the estate of the decedent, which

remained after payment of his debts and expenses of administration.

It is well settled in Pennsylvania that executors and administrators are trustees for creditors and beneficiaries and that all the property of the decedent vests at the time of death of decedent, subject to the payment of debts and expenses of administration.

In *Abbott's Executor v. Reeves, et al.*, 49 Pa. 494, Read, J. says (p. 505):

> "In Pennsylvania an executor is emphatically a trustee having no other interest than in his commissions and what may be directly given to him by the testator. All funds of the estate in his hands are trust funds, and if loaned by him to others with knowledge of the facts, are trust funds in the hands of the receiver, and, whether loaned properly or not must be repaid to the trustee."

In *Walworth v. Abel*, 52 Pa. 370, it is held that the mere legal estate of a decedent passes to the administrator, but if there be no creditors, the heirs have a complete equity in the property and may distribute it among themselves without administration.

In *Roberts v. Messinger*, 134 Pa. 298, Mr. Justice Sterrett says (p. 309):

> "While it is true that administration is the legally appointed channel through which an absolute title to personal property of an intestate is acquired, it is equally true that property of such intestate passes at his death to those legally entitled to the succession, subject to the claims of creditors and the laws in force for administering it.

In *Hood v. Maires,* 255 Pa. 128, Mr. Justice Walling says (p. 132):

> "The law favors vested rather than contingent estates and unless it clearly appears from the context or circumstances of the case that a contingent interest was intended, the remainder will be regarded as vesting at the death of the testator and not at the expiration of the life tenancy: *Bache's Estate* 246 Pa. 276; *Tatham's Est.* 250 Pa. 269.

In *Jenning's Estate,* 266 Pa. 60, in a *per curiam* opinion, the Court says (p. 62):

> "The daughter, Catherine, was *in esse* at her father's death; he fixed her mother's death as the time when she was to come into possession of her share in his estate; the bequest was not qualified, but absolute; no precedent condition was attached to it, and the time fixed for the enjoyment of it was not expressly or by implication annexed to the gift. The interest clearly vested at testator's death: *Carstensen's Est.* 196 Pa. 325; *Bair's Est.* 255 Pa. 169; *McCauley's Est.* 257 Pa. 377."

THE PROPERTY CONVERTED INTO A GIFT TO PETITIONER.

The widow had vested property rights to sell or give away, as in Pennsylvania not only vested interests but contingent interests may be sold. This is established in *Whelen v. Phillips,* 151 Pa. 312, in which case Mr. Justice Paxson says (p. 322):

> "But without inquiring as to the present status of the law elsewhere, it may be confidently asserted that a person, *sui juris,* owning a contingent remainder in land, or in personal property, may sell the same for such sum as may be agreed upon between himself and the purchaser, provided the

former does not stand towards him in a trust relation, and, in making the purchase, acts in good faith."

This is followed in *Long's Est.* 228 Pa. 594, and *Richardson's Est.* 236 Pa. 136.

Having acquired in 1919 the interest which vested in her at her husband's death, the widow in 1924 made a valid assignment in trust to the petitioner of ten per cent thereof, and in 1925 this gift was made absolute. The gift was assessed and a gift tax was paid thereon in 1925. The property evidenced by the gift vested in the petitioner by the assignment in 1924. The respondent assessed it at such a substantial amount that the gift tax thereon amounted to $2,417.90 (R. 35) and under the laws of Pennsylvania, the petitioner acquired the property and held it from that time.

As an incident to the vested right, she received the right to delivery of the shares of stock in controversy from the executors. These were delivered under Decree of Distribution dated November 3, 1927, less than two years from date of sale.

Petitioner sold the stock which was a part of the gift on March 14, 1929, almost five years from the original date of the gift and almost ten years from decedent's death. She realized considerable profit which she returned as capital gain.

POWER OF CONGRESS TO FIX THE BASIS OF GAIN OR LOSS.

Congress is not limited in fixing the basis of gain or loss so long as the basis is uniform. The basis can be cost or market value at a certain time. The time can be at acquisition, at decedent's death, at distribution or

relate back to cost of previous holder, but the time fixed must be at some period determined by property rights as ruled by the laws of the States.

Congress has the power to fix a holding period for capital assets other than determined by State law, but its definition must clearly indicate the beginning of such period at a point determinable from the time of acquisition under the State laws. Congress has uniformly recognized its limitation and has never attempted to define the time of acquisition contrary to the State laws. In the 1921, 1924 and 1926 Acts it established the basis for gain or loss at cost or the fair market value at the time of acquisition. In the 1928 Act it established three bases, to-wit: (1) Cost, (2) Value at time of acquisition or time of death of decedent, and (3) Time of distribution. In the 1934 Act it abandoned the bases at the time of death and time of distribution and returned to the two bases of cost or fair market value at the time of acquisition as under the 1926 Act.

THE REVENUE ACT OF 1928.

To compute the gain and determine the rate of tax on the sale of property, it is necessary to construe the relevant provisions of the Revenue Act in force at the time of the sale in 1929. This was the Revenue Act of 1928, 45 Stat. 791, and is entitled "An Act to reduce and equalize taxation, provide revenue and for other purposes."

Title 1, Income Tax, is divided into subtitles A to C.

Subtitle B, General Provisions, is again divided into Part I, Rates of Tax, and Part II, Computation of net income, followed by four other distinct parts, which are not material.

Under Part I, Rates of Tax, we have Section 11, Normal Tax on Individuals, Sec. 12 (a) Surtax on Individuals and Sec. 12 (c) Capital Net Gains and Losses. For rate and computation of tax in lieu of normal and surtax * * * see Sec. 101.

Under Part II, Computation of Net Income, Sec. 21, Net Income, Sec. 22 Gross Income, Sec. 22 (e), Determination of gain or loss and * * * In case of a sale or other disposition of property the gain or loss shall be computed as provided in Sec. 111, 112 and 113.

Sec. 101 we find under subtitle C, Supplemental Provisions, Supplement A, Rates of Taxes. Sec. 101, Capital Net Gains and Losses.

Sec. 111, 112 and 113, we find under subtitle C, Supplemental provisions, Supplement B, Computation of net Income, Sec. 111, Determination of amount of gain or loss. Sec. 112 Recognition of Gain or Loss. Sec. 113 Basis for Determining Gain or Loss.

Under Subtitle C, Supplemental Provisions, Supplement E, Estates and Trusts, we find Sec. 168, Capital Net Gains and Losses providing for taxing capital net gain or loss to the beneficiary or estate or trust under Sec. 101 (a) and (b).

From the division into titles and sections and the sharp outlined structure and composition of the Act, it is clearly evident that the different parts and their respective sections were intended to define and outline the subjects therein contained without limitation by or inference from the others.

The computation of net income was to be under the provisions of Part II and Supplement B of Subtitle C.

The rates of tax upon the income were fixed by the provisions of Part I and Supplement A and E of Subtitle C.

Each subject was treated wholly within its respective part and supplement without reference to or consideration for the provisions of the other part or supplement.

The ruling sections beginning as Sections 202, 206 and 210 of the Act of 1921, and 204, 208 and 210 of the Acts of 1924 and 1926, thus became in the Act of 1928, Section 113: Basis for Determining Gain or Loss; Sections 101 and 168: Capital Net Gains and Losses; and Section 11: Normal Tax. These sections of the Act of 1928 so far as material in this case appear in the Appendix (pp. 62-63).

Sections 113 and 101 as they were worded under Sections 202 and 206 of the Act of 1921 were construed in *Johnson v. Commissioner* in 52 Fed. Rep. 2nd 726, and Judge Buffington in his opinion said:

> "But this contention overlooks the fact that, while Section 202 relates to the basis for determining, in a proper case, the amount of gain of a taxpayer, Section 206 relates to determining what is required of a taxpayer to bring himself within its terms. In that respect, 206 is clear and self-explanatary, viz., a taxpayer who has acquired and held property for profit or investment for more than two years."

Following this in *Shoenberger v. Burnett,* 55 Fed. 2d, 543, the Court of Appeals of the Dist. of Columbia, Hitz, J., says:

> "The taxpayer contends that his gain made taxable by Section 202 (a) was 'capital net gain' under Section 206 (a) from 'capital gain' under 206

(a) (1) derived from 'capital assets' as intended to be defined by Section 206 (a) (6), and therefore he is entitled to the benefits of Section 206 (b).

The difficulty in maintaining this position is that the Act of 1921 divided as it is into different sections, dealing with different matters and situations, does no more by Section 202 (a) (2) than say he shall pay a tax on the difference between what his donor paid for the stock and the sale price thereof.

The percentage of tax thereon is prescribed by the later Sections 210 and 211.

But Section 206 comes between, and offers an alternative method of computing the tax to any individual taxpayer who for any taxable year derives a capital net gain (b).

And it does more. It contains its own definition of capital net gain as being the excess of the total amount of capital gain over the sum of capital deductions and capital net losses. Section 206 (a) (4).

And it also contains its own definition of 'capital gain' as being taxable gain from the sale of exchange of 'capital assets', Section 206 (a) (1).

While its sixth and final definition is that of 'capital assets' is property acquired and held by the taxpayer for profit or investment for more than two years. Section 206 (a) (6).

By that definition, Congress indicated a purpose to benefit by 206 (b) only taxpayers who having acquired property held it for profit or investment for more than two years."

In *First National Bank of Boston v. United States*, 76 F. (2d) 200, Wilson J., says, in speaking of the 1928 Act:

"Sec. 101 and Sec. 113 were enacted for entirely different purposes. The first defines capital assets and capital gains; the second defines the method of determining the amount of the gain, whether capital gains or income. They are not interdependent in the sense that the date from which gains or losses are computed must in all cases be the same as when the property was acquired by the taxpayer."

From the structure of the Act and from the decisions above cited, we must conclude that in the case at bar, Sec. 101 prescribes the method of determining the rate of tax and Sec. 113 provides the method for arriving at the base amount to be taxed. If, under the laws of the State, the property has been acquired and held for two years it qualifies as capital assets within the definition set in Sec. 101, and once eligible, its tenure cannot be outlawed by a construction placed upon the provisions of Sec. 113. Each section is self contained and rules for its particular purpose.

The Circuit Court of Appeals Erred in Affirming the Determination That the Date Which Governs for Gain or Loss Purposes in Sec. 113 (a) (5) of the Revenue Act of 1928 Must Be Used in Fixing the Date of Acquisition for Capital Gain Determination Under Sec. 101 (8) of Said Act, Thereby Voiding Any Previous Holding Period.

The controversy in the case at issue arises out of the amendment in 1928 of the Gain or Loss Sec. 113 (a) (5), Property transmitted at death.

The 1926 Act provided: If the property was acquired by bequest, devise or inheritance, the basis shall be the fair market value of the property at the time of such acquisition.

This was amended in part in 1928 to read: In all other cases if the property was acquired either by will or by intestacy, the basis shall be the fair market value of the property at the time of the distribution to the taxpayer.

The basis for gain or loss was thus changed from time of acquisition to time of distribution and the respondent determined that because it had been changed for gain or loss, the changed date must be used also for capital gain determination, as it would be inconsistent to hold that the property had been in the hands of the beneficiary prior to the time of distribution.

The Board of Tax Appeals and the Circuit Court of Appeals affirmed the position of the respondent.

In this we contend they erred because no substantial change was made in Sec. 101 in 1928 and no reference to capital gains was made in any of the Committee Reports. The reason for the change in Sec. 113 was the confusion caused by the decision in the Court of Claims in *McKinney v. United States,* 62 Ct. of Cl. 180, in the existing law as to the basis on which an executor must determine gain or loss on a sale of property of the estate. The purpose was to particularly specify and define the basis for gain or loss on property transmitted at death for the first time as the time of the death of the decedent and time of distribution, instead of the very general term of time of acquisition. This is confirmed by the Report of the Senate Committee on Finance and the Report of the Conference Committee on the Revenue Bill of 1928, which are set out in full in the Appendix (pp. 67 to 69). Their reports show conclusively that Congress had no intention of modifying or restricting the interpretation of the definition of "Capital Assets" in Sec. 101 (c) (8).

CAPITAL ASSETS DEFINED.

The capital gain section first appeared in the Revenue Act of 1921, and in Sec. 206 (a) (6), we find:

> "The term 'capital assets' as used in the Section means property acquired and held by the taxpayer for profit or investment for more than two years * * *

The definition of capital assets in Sec. 208 (a) (8) of the Revenue Act of 1924 is as follows:

> "The term 'capital assets' means property held by the taxpayer for more than two years."

This same phrase appears in Sec. 208 (a) (8) of the Revenue Act of 1926 and in Sec. 101 (c) (8) of the Revenue Act of 1928.

In *First National Bank of Boston v. United States*, 76 F. (2d) 200 (C. C. A. 1), Wilson, J., says:

> "In the 1921 Act, Sec. 206 (a) (6), it was provided that to constitute capital assets property must be 'acquired and held for two years.' In subsequent acts the word 'acquired' has been omitted, the obvious reason is that the word 'acquired' was surplusage, since, in general, property is held from the time it is acquired or one's ownership begins."

In referring to the definition of capital assets, Mr. Justice Butler, in *Helvering v. New York Trust Company*, 292 U. S. 455, says (p. 468):

> "The Revenue Act of 1926, Para. 208 (a) (8), contains substantially the same language as that used in the 1921 Act to define capital assets. That part of the subdivision is followed by rules for determining the period for which the taxpayer has held the property."

The rules referred to in Mr. Justice Butler's opinion were those added to Sec. 208 (a) (8) in the Revenue Act of 1926 as follows:

> "In determining the period for which the taxpayer has held property, however acquired, there shall be included the period for which such property was held by any other person, if under the provisions of Sec. 204, such property has for the purpose of determining gain or loss from a sale or exchange, the same basis in whole or in part in his hands as it would have in the hands of such other person."

These rules prescribe the method to be followed in tacking to the taxpayer's holding period the tenure of a previous holder to make up the two-year holding period in order to qualify the property as capital assets.

To identify the property, reference was made to Sec. 204 but after the property is identified as having the same base value for gain or loss in the hands of the previous holder as provided in Sec. 204, the question of whether or not it qualifies as capital assets is determined under the provisions of Sec. 208 (a) (8). There was no intention to restrict the definition of capital assets. The purpose was to specifically authorize the increase in the class of holders of capital assets by including the tenure of former holders.

As said in *Helvering v. New York Trust Company, supra*:

> "In view of the inclusion of the same definition in the Acts of 1921, 1924 and 1926, and the legislative purpose underlying it, the contention that the new words were added to change the meaning of capital assets as defined in the earlier acts is without force."

That Congress had no intention of changing the meaning of the definition of "capital assets" is best evidenced by the Report No. 52 of the Senate Committee on Finance and Report No. 356 of the Conference Committee on the Revenue Bill of 1926, the relevant portions of which are submitted in the Appendix (pp. 71-72).

These reports of the Congressional Committees clearly indicate the purpose is to add to the class of capital asset holders by enlarging the scope of the definition. No change is made in definition of the two-year holding period, but its construction is broadened to allow the tenure of the taxpayer and that of a previous holder to make up the two-year period. There is no intimation of an intention to restrict the definition in any way.

The provisions of Sec. 204 of the 1926 Act were reenacted in the 1928 Act as Sec. 101 and 168, without change in substance.

If there was no intention of changing the meaning of capital assets by the added provisions of the 1926 Act, it follows that there could be no such intention by their re-enactment in the 1928 Act.

Under the 1926 Act the petitioner would have been entitled to the capital gain privilege, because it so happened that under its provisions the basis for gain or loss was the time of acquisition, which has always heretofore been the date used in determining capital assets.

Under the 1928 Act, the base date for determining gain or loss was changed to time of distribution, but the requirement for capital assets remained a period of more than two years from time of acquisition.

TENURE FOR CAPITAL GAIN DETERMINATION BEGINS AT TIME OF ACQUISITION.

The time of acquisition was originally made the ruling element in determining capital assets and remains the ruling element. The time of acquisition is at the date the property was acquired by the taxpayer. The courts have so determined.

In *Dunigan v. Burnett*, 66 F. (2d) 201, (CADC), June 5, 1933, the Court said at page 202, in discussing the definition of capital assets in the Revenue Act of 1921:

> "In the case of stocks, bonds and lands bought for investment as an entirety, the applicability of the provisions of the statute depends solely on the time of acquisition."

In *Hooper v. Commissioner*, 26 BTA 758, the Board determined that a taxpayer who had acquired property on October 10, 1925 and sold the same at a profit on October 10, 1927, did not hold the property for more than two years, and said, at page 760:

> "In order for the petitioner to get the relief here sought, she must have held the property for more than two years from the time she acquired it."

In *Shaffer v. Commissioner*, 28 BTA 1294, the Board said at page 1309:

> "The two-year period mentioned in Sec. 208 (a) (8) begins to run from the date of petitioner's acquisition of the property and not from the date of payment therefor or the date when additional costs in respect thereof were incurred."

We have for determination then the question: When did the petitioner acquire her property for capital gain determination? Under the Pennsylvania law, the gift

by assignment was a valid transfer of the property and she acquired it at that time. Under the Revenue Act of 1928 and the rules prescribing the determination of capital assets, the petitioner could add to her holding period, the tenure of her donor and to determine this we must consider the Pennsylvania law. Under the Pennsylvania decisions cited *supra* (pp. 9-10), the property of decedents vests at the time of death. In *Greiner's Appeal,* 103 Pa. 89, it was held that the election which the widow made vested in her immediately and absolutely, one-half of the estate of the decedent, subject to the payment of his debts and administration expenses. This is conclusive that the property given to the donee by the widow donor was acquired by the widow on June 28, 1919. Petitioner's tenure, therefore, was from 1919. This finding is supported by this Honorable Court in *Brewster v. Gage,* 280 U. S. 327, in which it was necessary for the Court to construe Sec. 204 (a) (5) of the Revenue Act of 1921, as follows:

> "If the property was acquired by bequest, devise or inheritance, the basis shall be the fair market value of the property at the time of such acquisition."

Mr. Justice Butler, in his opinion, says (p. 333):

> "It is necessary to construe the word 'acquired' and the phrase 'at the time of such acquisition' to determine whether the value of the stock at the time of testator's death or its value on the date of the decree should be used in the calculation.
>
> Upon the death of the owner, title to his real estate passes to his heirs or devisees. A different rule applies to personal property. Title to it does not vest at once in heirs or legatees. *United States v. Jones,* 236 U. S. 106, 112. But immediately upon the death of the owner there vests in each of them

the right to his distributive share of so much as shall remain after proper administration and the right to have it delivered upon entry of the decree of distribution. *Sanders v. Soutter,* 136 N. Y. 97; *Vail v. Vail,* 49 Conn. 52, *Cook v. McDowell,* 52 N. J. Eq. 351. Upon acceptance of the trust there vests in the administrators or executors, as of the date of death, title to all personal property belonging to the estate; it is taken, not for themselves, but in the right of others for the proper administration of the estate and for distribution of the residue. The decree of distribution confers no new right; it merely identifies the property remaining, evidences right of possession in the heirs or legatees and requires the administrators or executors to deliver it to them. The legal title so given relates back to the date of the death. *Foster v. Fifield,* 20 Pick. 67, 70. *Wager v. Wager,* 89 N. Y. 161, 166. *Thompson v. Thomas,* 30 Miss. 152, 158.

Petitioner's right later to have his share of the residue vested immediately upon testator's death. At that time petitioner became enriched by its worth which was directly related to and would increase or decline correspondingly with the value of the property. And, notwithstanding the postponement of transfer of the legal title to him, Congress unquestionably had power and reasonably might fix the value at the time title passed from the decedent as the basis for determining gain or loss upon sale of the right or of the property before or after the decree of distribution. And we think that in substance it would not be inconsistent with the rules of law governing the descent and distribution of real and personal property of decedents to construe the words in question to mean the date of death."

This case recognized the rule of tax law that property transmitted at death is acquired at date of death. It was adopted and followed in *Chandler v. Field,* 63 F. (2d) 13 (CCA1), in which the Court says (p. 15):

> "The shares came to John P. H. Chandler, who acquired a vested interest in his mother's estate at the time of her death. He sold the stock; he made the gain; and, as was held in *Brewster v. Gage,* acquired the property, within the meaning of section 204 (a) (5) of the Revenue Act, at the time of his mother's death. And this being so, the gain is determined by deducting the value at her death from the sum received from the sale. If these specific shares held by the mother at the time of her death had not come to Mr. Chandler, he could not have sold them and made a gain and could not be taxed. But that has little to do with this case, for he did receive the stocks and sold them, and, by so doing, made a gain over and above their value at the time of his mother's death, which, according to *Brewster v. Gage,* was the time he acquired the property within the meaning of section 204 (a) (5)."

The rule has been followed and extended by the Board of Tax Appeals in the following cases:

In the case of *Abeles v. Commissioner,* 24 B. T. A. 435 (Acquiesced in by the Commissioner XI-1 C. B. 1), the Board held that stock received by the sons of the testator from a trustee of a residue-trust created under the will of their father was acquired by them on the date of the death of their father. In the opinion reference is made to the case of *Brewster v. Gage* and the Board says: "There, possession and dominion by the legatees was deferred during an indeterminate period of administration; here, possession is postponed for not

to exceed a five year trust period, the legatees meanwhile receiving the income earned by the stocks. We hold therefore, that the stocks in question were acquired upon the death of Julius D. Abeles on August 15, 1920."

See also *Griscom v. Commissioner,* 22 B. T. A. 979, *Security Trust Co. v. Commissioner,* 25 B. T. A. 29, affirmed, *Security Trust Co. v. Commissioner,* 65 F. (2d) 877 (C. C. A. 6, June 29, 1933), *Barber v. Commissioner,* 25 B. T. A. 513."

For capital gain determination under the provisions of the 1921 Act, the Commissioner has held that the period of holding commences with the date of decedent's death. I. T.1889-C. B.-III-1-1278.

In Income Tax ruling 1889 III-1 C. B. 70, the Commissioner has stated that under the definition of "Capital Assets" appearing in Section 206 (a) (6) of the Revenue Act of 1921, which is similar to the provisions of Section 101 (c) (8) of the Revenue Act of 1928 here in question, the two-year period during which assets must be held in the case of property received under the terms of a will, commences with the date of the testator's death. This ruling was promulgated prior to June, 1924, and is set forth here in full.

> "Advice is requested in regard to the Federal income tax liability arising from the sale by the taxpayer in 1922 of certain securities which he received in 1921 as part of his distributable share of the estate of his father, who died in 1919.
>
> "The particular question raised is whether the two-year period during which capital assets must be held entitle the taxpayer to the benefit of the provisions of section 206 of the Revenue Act of 1921 ran from the date of the testator's death or from the later date on which the beneficiary actually received possession of the securities.

I. T. 1889 continued.

The question requires a determination of the meaning of that part of section 206 (a) (6) which provides:

> 'The term "capital assets" as used in this section means property acquired and held by the taxpayer for profit or investment for more than two years * * *'

It is well settled that the interest of a distributee of a decedent's estate attaches upon the date of the decedent's death. Mr. Justice Holmes thus states the rule in *Hooper v. Bradford,* (1901) (178 Mass., 95, 97):

> 'The time when the property passes under a deed is not later than the death of the grantor. The same is true in the case of a will. It is true that in the later instance the interest of a legatee is subject to an account, but still it is an interest in the fund as it is, analogous to that of a *cestui que* trust, and vests at the death of the testator.'

To the same effect is *Mechanics' Savings Bank v. White,* (1889) (150 Mass., 234). The rule is the same in the case of intestacy, according to *Perryman v. Green* (1863) (39 Ala., 133):

> 'The right of a distributee attaches upon the death of the intestate. The interest then accrues, and the subsequent division serves to ascertain and define, convert it into a legal right, and reduce to possession, an equity which existed before in the form of a chose in action, cognizable in chancery.'

In an article in *21 Harvard Law Review,* 436, the result of the authorities is thus summarized:

> '* * * Neither an executor nor an administrator takes any beneficial interest in the

I. T. 1889 continued.

> decedent's property. And on the death of the testator or intestate, both legatees and next of kin get an immediate interest in the personal estate analogous to that of a *cestui que* trust.'

The Department has adopted this doctrine in regulations and rulings, holding that a distributee of property from a decedent's estate acquires at the date of the decedent's death for the purpose of determining gain or loss from its sale by such distributee. (Art. 1563, Reg. 62; L. O. 1012, C. B. 2, 34).

Granted, then that a distributee acquires an immediate interest in the decedent's estate the date of the decedent's death, and that this interest is analogous to that of a *cestui que* trust, is this interest 'property acquired and held by the taxpayer' from the time of death? In other words, does the quoted phrase embrace simply legal interests in possession, or does it further embrace the beneficial interest of a distributee, which later is converted into a legal interest by the actual distribution?

That Congress did not intend to require legal title and possession by the use of the terms 'acquired and held' in defining capital assets is strongly indicated by subdivision (c) of section 206, stating the method for the application of the section to cases of partnership, estates or trusts. The subdivision provides:

> 'In the case of a partnership or of an estate or trust, the proper part of each share of the net income which consists, respectively, of ordinary net income and capital net gain, shall be determined under rules and regulations to be prescribed by the Commissioner with the approval of the Secretary, and shall be sepa-

I. T. 1889 continued.

rately shown in the return of the partnership or estate or trust, and shall be taxed to the member or beneficiary or to the estate or trust as provided in sections 218 and 219, but at the rates and in the manner provided in subdivision (b) of this section.'

These provisions give the beneficiary of an estate or trust the privilege of computing his tax under section 206, although the estate or trust and not the beneficiary had legal title to and possession of the capital assets sold. If the phrase 'property acquired and held by the taxpayer' in the definition of capital assets requires legal title and possession in him, it is obvious that subdivision (c) could not be given effect, so far as a beneficiary of an estate or trust in the designated cases is concerned. Since the section should be construed so as to give effect to both provisions, rather than merely one (*Monroe Co. v. Riordan* (1922) (280 Fed., 624, 626)), it appears that Congress did not intend the words 'property acquired and held by the taxpayer' to refer exclusively to legal property interests; but that beneficial interests in property are also included. Moreover, according to the doctrine of the cases quoted *supra*, a distributee of a decedent's estate has an interest vesting at the decedent's death analogous to that of a *cestui que* trust; section 206 (c) expressly grants to a *cestui* the privilege of determining his tax in the manner provided by that section; accordingly, the distributee should be accorded a like privilege.

Further, in view of the express purpose for enacting the section it is very unlikely that Congress intended to distinguish between legal and beneficial interests in its application. It is well known

I. T. 1889 continued.

that section 206 was adopted to provide relief for taxpayers who realize in a single year a gain accumulated over several years (see notes on the Revenue Act of 1918, pp. 15-16; report from Committee on Ways and Means, dated August 16, 1921, p. 10; report from Finance Committee dated September 26, 1921, p. 12). The reason for the enactment is directly applicable to the instant case. The property in question was acquired by the taxpayer under the regulations at the date of the testator's death; the gain resulting from its sale is one accumulated over more than two years, during all of which time it has been retained for the taxpayer. The fact that during part of that period an executor or administrator was in possession of the property should not affect the result, since the taxpayer acquired the property at the testator's death, and thereafter the beneficial ownership was in him.

Moreover, the Department has adopted the view, both in the regulations and in its rulings, that the phrase 'acquired and held by the taxpayers' does not require actual possession of the assets in all cases. Article 1651 of Regulations 62 provides in part:

> "* * * The specific property sold or exchanged must have been held for more than two years, but in the case of a stock dividend the prescribed period applies to the original stock and the stock received as a dividend considered as a unit and where property is exchanged for other property and no gain or loss recognized under the provisions of section 202, the prescribed period applies to the property exchanged and the property received in exchange considered as a unit. * * *"

I. T. 1889 continued.

In neither of these cases would the taxpayer have had possession during the two-year period of the specific property disposed of, although the identity of the particular investment during that time would be sufficiently established. In I. T. 1660 (C. B. II-1, 36), in which the exact question herein has been considered by the Unit, it has been held that the two-year period provided in section 206 (a) 6 begins to run on the date of the decedent's death.

Finally, as stated above, it is well settled that for the purpose of computing gain or loss from the sale by the beneficiary of property acquired by bequest, devise, or inheritance, the property is acquired by the beneficiary as of the date of the decedent's death. (Art. 1563, Reg. 62; L. O. 1012, C. B. 2, 34). Hence, in the instant case, the taxpayer acquired the securities at the date of the decedent's death; and that particular investment has been kept intact as the taxpayer's from that date to the date of sale, a period of more than two years. The gain thereby realized represents an accumulation over a period of more than two years. In view of the indications within the section itself that a taxpayer possessing a beneficial interest in property may have the benefit of its provisions, and of the construction placed upon the section by the regulations and rulings, it is held that the taxpayer herein is entitled to compute his tax with reference to the gain on the sale of the securities here in question on the basis provided in section 206."

These rulings of the Commissioner of Internal Revenue are still in effect as they have never been amended or revoked, since the date on which they were promulgated.

The Commissioner, by sound reasoning, thus ruled under the 1921 Act that where the taxpayer acquired securities at the date of decedent's death and that particular investment has been kept intact as the taxpayer's from that date to the date of sale, a period of more than two years, the gain realized represents an accumulation of over two years and the taxpayer is entitled to compute his gain at capital gain rates.

By the reenactment of the same provisions without change in the Revenue Acts of 1924, 1926 and 1928, this administrative interpretation and construction of the 1921 Act must be considered as having the approval of Congress:

Helvering v. Bliss, 293 U. S. 144;
Brewster v. Gage, 280 U. S. 327;
United States v. Dakota-Montana Oil Co., 288 U. S. 459.

In the case at bar he has not followed his previous rulings. The amendment to the gain or loss section has led him into the error.

Respondent has not given proper consideration to the position of the widow's interest under the Pennsylvania law. Strictly speaking it rises higher than any of the classes of property set out in Sec. 113 (a) (5) as being transmitted at death. It was an interest created by Pennsylvania Statute and in taking it the widow can thus set aside any specific bequest, or general or specific devise of real estate, which interferes with her receipt of one-half of the estate.

In *Evans's Estate*, 150 Pa. 212, Mr. Chief Justice Paxson, says (P. 218):

> "It is the settled rule in Pennsylvania that where a wife elects to take against her husband's will, equity executes the substituted devises and

bequests to the wife as a trust in her for the benefit of disappointed claimants to the amount of their interest therein, and the Court will assume jurisdiction to sequestor the benefit intended for the refusing wife in order to secure compensation to those whom her election disappoints: (*Sandoe's Appeal*, 65 Pa. 314; *Gallagher's App.*, 76 Pa. 296; *Young's App.*, 108 Pa. 17; *Ferguson's Est.*, 138 Pa. 208; *Bationes Est.*, 136 Pa. 307)".

The interest of the widow thus takes precedence and is preferred over any specific bequest or general or specific devise of real estate and in construing the taxing laws she is entitled to at least as favorable a position from a capital gain standpoint. In a like case the legatees and devisees are entitled under the 1928 Act to claim capital gain *tenure* from date of death. As she may have a prior right to the same property, her *tenure* could not be any less than theirs. She had an absolute right at her husband's death and her *tenure* cannot be construed to begin after that time without disregarding the rules of property prevailing in Pennsylvania.

The date of decedent's death is the time of acquisition by the widow and this date governs for capital gain purposes.

The determination that the date which governs for gain or loss purposes must be used in fixing the date of acquisition for capital gain determination is therefore in error.

The Circuit Court of Appeals Erred in Affirming the Determination That the Petitioner's Basis for Determining Capital Gain or Loss Was Limited, Reduced and Restricted by Sec. 113 (a) (5) of the Revenue Act of 1928 and That November 3, 1927 Is the Date Which Governs the Determination of Capital Net Gain or Loss.

The property sold by the petitioner was distributed and delivered to her on November 3, 1927. Her interest in the property was given to her in trust on June 23, 1924 and absolutely on August 1, 1925 by written assignments by her mother. (R. 34 and R. 35).

Her mother, the donor, acquired a vested interest in the property at her husband's death on June 28, 1919, and for capital gain determination, the petitioner's holding period added to the donor's holding period amounted to almost ten years at the time of sale on March 19, 1929. The Board of Tax Appeals in its opinion in the case at bar, says (R. 23):

> "The petitioner contends that whatever the amount of profit, it was a capital net gain within the meaning of the statute, and respondent contends that it was ordinary net profit and not taxable under the capital net gain provisions of the statute. The contentions of the respondent are set forth in his deficiency notice to the petitioner under date of December 16, 1932, as follows:
>
> * * * * * * *
>
> 'It appears that the stock in question was acquired under an assignment by your mother of a portion of her interest in the Estate of T. H. Given and the basis for gain or loss in accordance with Section 113 (a) (2) of the Revenue Act of 1928 is the same as it would have

been in your mother's hands. Therefore, the period during which your mother held the property should be added to the period it was held by you in order to determine the total period for which the particular property was held.

In this case, the decree of distribution of the stock was not made until November 3, 1927, and that governs for gain or loss purposes under Section 113 (a) (5) of the Revenue Act of 1928. In view of this fact it is inconsistent to hold that the stock was in your mother's hands prior to November 3, 1927, the date of the decree of distribution. That date which governs for gain or loss purposes as the law specially so provides should be used also for capital gain determination. * * *

The opinion continues: (R. 27)

"It will be noted from our findings that T. H. Given died testate on June 28, 1919. In his will he made no provision for his widow. The widow, on July 3, 1919, elected to take against the will of her deceased husband, one-half of his estate in lieu of her dower under the laws of Pennsylvania. By virtue of such election one-half of the estate of her deceased husband vested in her immediately and absolute. *Re Greiner's Appeal,* 103 Pa. 89. It was not, however, one-half of the specific assets of the estate which became her property by virtue of the election, but only one-half of the estate after the debts and other charges of administration should be paid. * * *

Continuing: (R. 28)

"While the shares of stock were in the custody of the executors they were not in any proper sense 'held' by the petitioner. * * * She sold the shares

of stock which were distributed to her by the executors of the estate on November 3, 1927. Prior to that date the dominion and control over the shares were in the executors of the estate and not in the petitioner. In view of these facts we think it cannot be said that the petitioner held them for a period of two years at the date of sale. The respondent's contention on this point is sustained."

The Circuit Court of Appeals for the Third Circuit affirmed the Board of Tax Appeals in its decision.

In *Dibblee v. Commissioner,* 29 B. T. A. 1070 (February 3, 1934), the Board said

"Petitioner had acquired the securities by general bequest under the will of her deceased mother and they were distributed to the petitioner under a decree of final distribution dated May 21, 1927. Prior to that date the possession of the securities was in the executors of the estate for purposes of administration and not in the petitioner. In view of these facts we conclude that the petitioner had not held the assets within the meaning of Section 101, for a period of two years before they were sold and is, therefore, not entitled to report that profit as capital net gain."

This decision was affirmed by the Ninth Circuit Court of Appeals, in opinion reported in 75 F. (2d) 617, in which the Court says:

"The controversy arises from an application and interpretation of the provisions of Section 101 and Section 113 (a) (5), which definitely establish both the method of determining the period of holding and the basis for the determination of the taxpayer's gain. They are to be read together and when done so, on all personal property acquired by

specific bequest the basis shall be the fair market value of the property at the time of the death of the decedent, and if the property be acquired either by will or by intestacy the basis shall be the fair market value of it at the time of distribution to the taxpayer. Capital assets, as defined by Section 101 (c) (8) of the Revenue Act means 'property held by the taxpayer for more than two years.' Petitioner asserts that under these provisions of the act the profit resulting from the sale of the securities was 'capital gain' and, consequently, taxable as such, and not as 'ordinary income', and if correct there would be no deficiency.

The securities upon which petitioner realized a profit of $28,441.86 were the property of decedent at the time of her death, which was more than two years before the date of sale, and were acquired by petitioner as a general bequest of personal property by will, and would seem to be governed by the provision in Section 113 (a) (5) of the act, that

> 'In all other cases if the property was acquired either by will or by intestacy, the basis shall be the fair market value of the property at the time of the distribution to the taxpayer.'

But it is argued by the petitioner that the laws of California determine the date from which the taxpayer 'held' the securities in question, as under the laws of that State the legal title to property transmitted by will or intestacy vests immediately upon the decedent's death in the devisee, legatee or heir, as the case may be. We can not agree with the correctness of the contention, for the Federal statute determines the time the taxpayer 'acquired' personal property, when acquired as a general bequest by will, to be at the time of the distribution to the taxpayer, and not at the time of decedent's

death. Therefore, the taxpayer is considered as 'holding' the securities only from the time of distribution. The purposes or effect of the revenue laws of the United States cannot be contravened by state law. *Burk-Waggoner Assn. v. Hopkins,* 269 U. S. 110; *Weiss v. Wiener,* 279 U. S. 333; *Corliss v. Bowers,* 281 U. S. 376, 378.

The decision of the Board of Tax Appeals is affirmed."

In a similar case, *Ogle v. Helvering* (77 F. (2d) 338) (C. C. A. 2) reported in C. C. H. '35, Vol. 3, Par. 9366, affirming an unpublished memo opinion of the Board of Tax Appeals in a *per curiam* opinion, the Second Circuit Court says:

"This appeal involves a question of the meaning of 'capital assets', as that term was used in Sec. 101 (c) (8) of the Revenue Act of 1928. Mrs. Ogle, the taxpayer, was one of the next of kin of one, Rand, who died intestate on October 31, 1925, leaving some shares of stock as part of his estate, which his administrator distributed to her on January 28, 1927, and which she sold on May 28, 1928, at an advance above their value at distribution. The question is whether she 'held' the shares from October, 31, 1925, or from January 28, 1927; on this depends her privilege under Sec. 101 (a) to limit her tax to one-eighth of the gain. If she 'held' them only from the date of distribution, the gain was part of her ordinary income, as the commissioner and the Board have held. The Circuit Court of Appeal of the Third and Eighth Circuits have decided the point in favor of the Treasury; that of the First, *contra*. *McFeely v. Helvering,* 74 Fed. (2) 1017 (C. C. A. 3); *Dibblee v. Helvering,* 75 Fed. (2) 617 (C. C. A. 9); *First National Bank v. United*

Ogle v. Helvering continued.

States, 75 Fed. (2) .... (C. C. A. 1). Although it is extremely likely that the Supreme Court will allow certiorari, we must nevertheless decide the case, else the taxpayer may not secure an independent hearing in that court.

Brewster v. Gage, 280 U. S. 327, on which the taxpayer relies, does not help her. It did hold that the word, 'acquired', in the Acts of 1918 and 1921, referred to the death of the taxpayer's ancestor; it did not even intimate that 'acquired' and 'held' were synonymous. But that aside, the question before the court was not of the two years period under Sec. 101 (a) or its predecessors, but barely as to the proper 'basis' for a gain taxed as ordinary income. At least in the Act of 1921, Sec. 202 (a) (3) expressly fixed the date of 'acquisition' as the date for the 'basis'; section 113 (a) (5) of 1928 fixes the date of distribution in the case of intestacies of the personalty, as the opinion in *Brewster v. Gage* observed. This taxpayer cannot afford to concede that the date of 'acquisition' is the date of the 'basis', even though 'acquisition' and 'holding' were the same. Moreover, she cannot tack the administrator's tenure before distribution to her own; under the Act of 1928 tacking is controlled by subdivision B. of Sec. 101 (c) (8) and is permissible only when the 'basis' of the taxpayer under Sec. 113 is the same as that of a predecessor in tenure. The 'basis' of the administrator is fixed by Sec. 113 (a) (5) as the value at the death of the intestate. The taxpayer to succeed must prove as *res integra* that she 'held' the shares throughout the period of administration.

Section 113 (a) (5) was pretty plainly drafted in conformity with the general municipal law re-

lating to estates. Gains on devises, realty descended, and specific legacies were measured from the death of the ancestor; on pecuniary and residuary legacies and on intestacies of personalty, from distribution; in all cases coinciding with the vesting of title at common law. It seems to us that this pattern ought not only to determine the 'basis', but the period on which the privilege should depend. The word 'held', is indeed colloquial; we need not say that it always implies possession; it does not. *Helvering v. N. Y. Trust Co.*, 292 U. S. 455; *Commissioner v. Nevius*, 76 Fed. (2) .... (C. C. A. 2). But in this context we think it does. Otherwise we should have to say that between the intestate's death and distribution the administrator and the next of kin both 'held' the personalty. The administrator, had he kept the shares for more than two years after the intestate's death and then sold them, would surely have had the privilege conferred by Sec. 101 (a), like an individual. If he 'held' during that period, the next of kin did not, yet unless he did, he may not limit the estate's tax. Moreover, in general the statute makes the time at which the 'basis' is fixed, the starting point of the period which determines the privilege. So strong is this as even to control the term 'held' when its natural meaning is otherwise. *Helvering v. N. Y. Trust Co., supra,* (292 U. S. 455). Here we need do no violence to that word in order to conform with the general plan; rather we should have to wrench it unduly to do anything else. Finally, the privilege is in any case a partial exemption, and the taxpayer must bring herself clearly within it.

Order affirmed."

The Board of Tax Appeals and the Second, Third and Ninth Circuit Courts in affirming them have taken

the narrow untenable position that in decedents' estates no property right existed which could be interpreted as "being held" by the distributee until reduced to possession by distribution. In these cases they decided the distributees had not held the assets within the meaning of Section 101 for a period of two years before they were sold and that the two-year period commenced to run from the date of distribution, when the petitioners actually acquired physical possession of the personal property.

This is in direct conflict with the decision in *Brewster v. Gage*, 280 U. S. 327, in which this Court says:

> "The decree of distribution confers no new right, it merely identifies the property remaining, evidences right of possession in the heirs or legatees, and requires the administrators or executors to deliver it to them. The legal title so given relates back to the date of death."

The Supreme Court thus sustained one of the rules of property which exists in most of the States that title to property passing by bequest, devise or inheritance is acquired at the date of decedent's death.

The Ninth Circuit Court, however, in *Dibblee v. Commissioner, supra*, says:

> "We cannot agree with the correctness of this contention (that the legal title to such property vests upon decedent's death as held in *Brewster v. Gage, supra*) for the Federal Statute determines the time the taxpayer 'acquired' personal property, when acquired as a general bequest by will, to be at the time of distribution to the taxpayer, and not at the time of decedent's death."

This interpretation of Sections 101 and 113 can only be from a strained inference and not from the actual wording of the provisions "capital assets means property held more than two years", and "if the property was acquired either by will or intestacy, the basis shall be the fair market value of the property at the time of the distribution to the taxpayer". It cannot be supported by giving the words used in these provisions their usual and ordinary meaning and this is the meaning required to be given statutes in their interpretation by the Supreme Court as decided in *DeGanay v. Lederer*, 250 U. S. 376, in which the Court said at page 381:

> "Unless the contrary appears, statutory words are presumed to be used in their ordinary and usual sense, and within the meaning commonly attributable to them".

The word "held" as used in regard to property, as in Section 101 (c) (8), means "owned" or "having title to" and property "owned" by a taxpayer is property "held" by the taxpayer. The word "acquire" means "to get or gain", "to get as one's own", or "to get as one's own, as to acquire a title." These meanings appear in the standard dictionaries without qualification.

Thus it would appear that the Second and the Ninth Circuit Courts have placed an unusual, limited and restricted meaning on the words "held" and "acquired" in the statute in determining that under Sections 101 and 113 personal property acquired as a general bequest by will, is not acquired at decedent's death but is acquired at time of distribution, and to decide therefore that the taxpayer is considered as "holding" the securities only from the time of distribution.

The Ninth Circuit Court dismisses these decisions of the Courts concerning the vesting of property of es-

tates of decedents by citing certain cases to show that the purposes and effect of the revenue laws of the United States cannot be contravened by state law.

In citing these cases the Circuit Court failed to recognize that the issues therein raised and determined were not concerning the basic rules of property and that as the Court said in *Harmel v. Commissioner*, 56 F. (2d) 153, "It is no new doctrine that a rule of property prevailing in a state, and changes in that rule, will be recognized in administering the federal income tax law. *United States v. Robbins*, 269 U. S. 315."

And further as said in *Johnson v. Commissioner*, 56 F. (2d) 58, "State laws do not control federal taxing statutes unless creating a rule of property."

The time the taxpayer acquires property is determined by the law of the States and this was overlooked by the Second and the Ninth Circuits in construing these provisions of the tax law.

The Third Circuit Court in the McFeely case at bar limited themselves in their *per curiam* opinion to affirming the order of the Tax Board without discussion (R. 56).

The Board of Tax Appeals, however, recognized the rule of property as set up in *Brewster v. Gage*, 280 U. S. 327, in saying in the opinion (R. 27):

> "The widow, on July 3, 1919, elected to take against the will of her deceased husband, one-half of the estate in lieu of her dower under the laws of Pennsylvania. By virtue of such election one-half of the estate of her deceased husband vested in her immediately and absolutely. *Re Greiner's Appeal*, 103 Pa. 89."

but then immediately fell into error by drawing a distinction between the equitable title and actual possession in defining the holding period for capital assets, saying in their opinion (R. 28-29):

> "She sold shares of stock which were distributed to her by the executors of the Estate on November 3, 1927. Prior to that date the dominion and control over the shares were in the executors of the estate and not in the petitioner. In view of these facts we think it cannot be said that the petitioner held them for a period of two years at the date of sale."

Thus, although the time of acquisition of title as defined under the state laws was originally made the ruling element in determining "capital assets", and remains the ruling element in all other cases, the Board has placed an unusual and restricted meaning on the words in the statute, in so far as residuary property of a decedent is concerned, and decided that this property is not acquired or held until physical possession is delivered at the time of distribution for the purpose of determining whether or not it is a "capital asset". This position must be predicated on the presumption that under the laws of the State the taxpayer has no valuable interest in the property until delivery of possession.

Possession Not a Controlling Element.

Physical control and possession has never heretofore been considered an essential element in the definition of the word "held" as used in the Capital Gain Section 101 except in the case at bar. The Respondent and the Board of Tax Appeals have not held possession, dominion and control for two years to be requisite in allowing capital net gains to beneficiaries on property sold for them by executors before distribution or in

stock dividends, stock subscription rights, stock purchased on margin, interests in stock exchange memberships issued to old members, agreements to purchase real estate where the original source of title was acquired more than two years before sale.

In the case of specific legacies of securities, if possession is an essential element and the same rule is applied even though the basis for gain or loss under the 1928 Act is date of decedent's death, the holding period for capital gain could not begin until time of distribution and the basis for gain or loss would be different than the date of acquisition.

Thus singling out residuary estates, respondent and the Board of Tax Appeals attempt to amend the capital gain provisions of the Act of 1928, Section 101, by reading into it "capital assets means property the physical possession, dominion and control of which has been held for more than two years," because the basis of gain or loss in Section 113 has been changed in the 1928 Act to date of distribution, and it would be inconsistent to have two dates for these two different purposes.

This directly contradicts the reasoning of the ruling made in I:T 1889 III-1-70 *supra*.

This construction is without precedent and unwarranted and results in an absurd and unjust penalty to petitioner. If she had sold the stock in question on December 31, 1927, she would have been entitled to the capital gain rate on her profit, because *Brewster v. Gage, supra*, established that the property was acquired at the date of decedent's death and she and her donor would have held it more than two years, but if she sold on a day later, January 1st, 1928, she is deprived of the capital gain rate and must pay the ordinary net income

rate because the Court decides she holds it from the date of distribution, notwithstanding the fact that, although the gain and loss section was changed, the capital gain section was reenacted in the Revenue Act of 1928 without change. The penalty is imposed by an interpretation and not by an actual amendment.

We respectfully submit that neither the Circuit Courts nor the Board of Tax Appeals has offered any sound legal theory to support this radical determination that petitioner's basis for capital gain or loss was limited, reduced and restricted by Sec. 113 (a) (5) to the time of distribution, November 3, 1927. This determination is manifestly in error.

The Circuit Court of Appeals Erred in Affirming the Determination That Capital Gain From the Sale of Capital Assets Under the Requirements of Section 101 Is Reduced to Ordinary Net Income Because the Basis of Determining the Gain as Prescribed in Section 113 (a) (5) Sets a Date Over Two Years After the Date of the Actual Acquisition of the Capital Assets.

The provisions of Section 113 should not be considered in determining whether petitioner's property qualifies as capital assets under Section 101. The petitioner acquired property in 1924 by gift. It was an equitable vested interest in an estate. It carried the right to the income during administration, the right to delivery by distribution and the acquisition of the legal title. It had a large monetary value at the time of gift and could have been sold at any time thereafter. It has all the qualifications of property of value as covered by the provisions of the income tax laws.

Under Section 168 the petitioner also had the right before distribution, as an assignee of a beneficiary of the estate, to have her share of the capital net gain or capital net loss determined and taxed to her at the rates and in the manner provided in Sec. 101.

After two years from the date of the gift, her share of the gain or loss on the sale of assets qualified as capital gain or loss, without invoking the privilege of tacking donor's tenure. Conceding her all the rights of a purchaser of the same property, and she had just as legal a title, and considering her paying an income tax on her property from the time of gift, can anyone deny that she was a taxpayer on property held for more than two years, or that she sold capital assets in 1929 when she disposed of the property she had held from 1924. Her property met all of the requirements of the definition. "Capital assets" means property held by the taxpayer for more than two years.

This Court has said in *Helvering v. New York Trust Company*, 292 U. S. 455,

> "In view of the inclusion of the same definition in the Acts of 1921, 1924 and 1926, and the legislative purpose underlying it, the contention that the new words were added to change the meaning of capital assets as defined in the earlier acts is without force."

These same provisions of the 1926 Act were reenacted in the 1928 Act and we must conclude that the original meaning of capital assets was still the same. However, the Commissioner did not so conclude for he has decided that although the property sold meets all of the requirements of capital assets, the profit cannot be capital gain but must be ordinary net income because

under Sec. 113 her gain is the same as the donor's would have been and the donor's base is fixed by the gain and loss section as amended in 1928 as three years after the date of gift and less than two years before the date of sale.

The commissioner thus assumes that the donor had no property of value to give; that the petitioner received nothing in 1924, although a substantial gift tax was paid thereon. This is a violent presumption and without a semblance of merit.

The Commissioner invoked the tacking rule of Section 101 (b) (8) to tie the transaction into Section 113 for the purpose of reducing the holding period, instead of increasing it. Petitioner's profit qualified under the definition of capital assets, without the benefit of the tacking privilege and the commissioner was not called upon to consider any part of the section except the definition "property held by the taxpayer for more than two years".

This conclusion is reached by giving to the capital gain section a new meaning inferred from a change in 1928 in the gain and loss section making a new base for gain or loss from time of acquisition to time of distribution.

An inferential construction from the gain and loss section is thus used to nullify the capital gain provisions under which petitioner's profit fully qualifies as capital gain.

In computing her gain, Section 113 provided that it was the same as her donor. The donor's basis for gain was time of distribution (November 3, 1927), and the amount of profit was thus established within the

provisions of Sec. 113. The one section established the amount of gain and the other section established that the rate of tax thereon was the capital gain rate.

There would be no conflict in thus carrying out the requirements of these sections of the Act and the rules of property prevailing in Pennsylvania would have been recognized in administering the law.

The Board of Tax Appeals admits that the petitioner acquired an equitable interest of value by the gift in 1924 and the profit on its sale in 1929 would have been capital gain. In the opinion (R. 28) the Court says:

> "Conceivably, if in 1929 the petitioner had sold, not the 1,000 Radio stock in question, but her interest in the Estate of T. H. Given, the profit would have constituted capital gain, for she acquired that interest by gift from her mother on August.1, 1925, and would have owned it for a period of more than two years at the date of sale. But she did not sell the gift *res* or a fractional part of it. She sold shares which were distributed to her by the executors of the Estate on November 3, 1927. Prior to that date the dominion and control over the shares were in the executors of the Estate and not in the petitioner. In view of these facts, we think it cannot be said that the petitioner held them for a period of two years at the date of sale".

Thus, in its opinion, it assumes a dual position. An equitable interest held for more than two years and which carries the right to legal title need not be reduced to physical possession to be eligible as capital assets. Part of same interest reduced to possession by distribution is not eligible until legal title is held for more than two years after distribution. The period between ac-

quiring the equitable title and receiving delivery of the certificates is denied the petitioner as a "holding period" for capital gain purposes.

The Commissioner aribitrarily and without legislative authority defines the time of acquisition to be the time of distribution and thus nullifies the vesting of property by postpoining it until distribution. He determines that it would be inconsistent to hold that petitioner obtained property before the date from which gain was to be computed. He overlooked the fact that under Sec. 168 she had the capital gain privilege on profit from the sale on the same property before possession at the time of distribution and that in providing for this privilege Congress recognized her acquisition to be effective before distribution.

There has been no change in the capital gain provisions in the 1928 Act or in any of the Acts after 1921 which limited the capital gain privilege to the tenure from time of distribution. It was only the basis for gain or loss which was so limited.

Following out the purpose of the Act to reduce taxation, Congress decided in the case of residuary and general beneficiaries to tax only that part of the gain on their property which accrued from the time of distribution. They reenacted the provisions of Sec. 168 authorizing the capital gain privilege on this same property if sold during the period from time of acquisition at decedent's death to the time of distribution. They placed no restriction on the capital gain determination as applied to the gain computed on the basis of the time of distribution. The logical conclusion is that they intended the capital gain provisions to apply.

Because Congress waived taxing the gain on the period from time of acquisition to the time of distribu-

tion, the Commissioner, without any legislative authority, refuses to credit the taxpayer with this period in determining the capital gain eligibility.

His position is biased because of reduction in the amount of gain in addition to the application of the lower capital gain rate. This is to him inconsistent in granting too much of a reduction.

There is no authority in the law to support this determination and it is clearly in error.

HOLDING PERIOD BEGINS AT DATE OF DECEDENT'S DEATH.

BASIS FOR AMOUNT OF GAIN IS TIME OF DISTRIBUTION.

As already argued under Sec. 101, the petitioner's tenure for capital gain purposes is the tenure of the donor from date of decedent's death to time of gift, tacked to the petitioner's tenure from time of gift to time of sale. Her gain under Sec. 113 is the difference between the value at the time of distribution and the amount realized by the sale.

This position is supported by the Circuit Court of Appeals for the First Circuit in two cases recently decided.

In the case of *Frances G. Lee v. Commissioner of Internal Revenue* (76 F. (2nd) 203) (C. C. A. 1), which was decided by the Board of Tax Appeals upon authority of the McFeely case at bar (R. 60), the Circuit Court of Appeals for the First Circuit says, in reversing Board of Taxes Appeals unpublished Memorandum Opinion:

> "WILSON, J.: This is a petition for review of a decision of the Board of Tax Appeals. The main issue is the same as that involved in the case of *First National Bank of Boston et al. v. United*

States, decided by this court on March 9, 1935. There was a sale of securities by a residuary legatee in 1929, more than two years after the death of the testator, but less than two years from the date of distribution. The Commissioner assessed the gain in accordance with Sec. 113 (a) (5) of the Revenue Act of 1928, but held it was not a capital gain, which was affirmed by the Board of Tax Appeals. Since the acquisition of the securities sold dates back to the death of the testator, *Brewster v. Gage*, 280 U. S. 327; *Chandler v. Field*, 63 Fed. (2d) 13, 15; certiorari denied, 289 U. S. 758; *Walker v. Hill*, 73 N. H. 254; *Sanborn v. Clough*, 64 N. H. 315, they were held more than two years and should be treated in assessing the tax as a capital gain, although the amount of the gain was properly determined under Sec. 113 (a) (5). See *First National Bank of Boston et al. v. United States, supra.*"

In the case of *First National Bank of Boston et al. v. United States of America* (76 F. (2d) 200), (C. C. A. 1), referred to in *Lee v. Commissioner, supra*, and reversing a like decision in the District Court (7 F. Supp. 915), the Court says:

"Edward E. Blodgett died April 4, 1926. By his will he bequeathed to the petitioners as trustees the residuum of his estate consisting, in part, at least, of securities. Sometime after April 4, 1928, and more than two years after the testator's death, but less than two years after they were turned over to the trustees by the executor of the will, some of the securities were sold by the trustees at a gain of $74,773.08 over their value at the time of distribution, which value, under Sec. 113 (a) (5) of the Revenue Act of 1928, was the basis for determining gain or loss in case of residuary bequests.

First National v. U. S. continued.

The petitioners contend that under the rule laid down in *Brewster v. Gage*, 280 U. S. 327, as to the date of acquisition, and according to the laws of Massachusetts, the securities had been held by the trustees for more than two years and the gain was, therefore, a capital gain and should have been taxed as such under Sec. 101 (a) of the Act of 1928. The government, however, contends that Congress has a right to determine what shall be considered capital assets and the basis for determining gains and losses; and that, inasmuch as the basis for determining the gain or loss in case of a sale of personal property acquired under a residuary bequest is fixed in Sec. 113 (a) (5) of the same Act as the value at the time of distribution, Congress must have intended that in such case the date from which the two year period is to be computed is also the date of distribution. The government also contends, since the provisions of Sec. 101 (c) (8) B provide that, in determining the period during which a taxpayer has held property, there shall also be included the period for which such property has been held by any other person, provided that under the provisions of Sec. 113 such property has for the purpose of determining gain or loss the same basis, in whole or in part, in the hands of the taxpayer as it would have had in the hands of such other person, that the period during which these securities were held by the executor cannot be added to the time in which they were held by the trustees; since the basis for computing the gain, if sold by an executor, is the value at death of the testator, while in the case of the residuary legatee it is the date of distribution.

It should be noted, however, that the reference

First National v. U. S. continued.

in Sec. 101 (C) (8) B is not alone to para. (a) (5) of Sec. 113, but to the entire section, which contains other instances of the arbitrary fixing of the base value for determining gains and losses. This contention of the government is evidently based on the theory that a legatee acquires title from the executor, but since a legatee, whether special or residuary, does not acquire his title from the executor, but under the will, *Brewster v. Gage, supra; Chandler v. Field,* 63 Fed. (2d) 13, 15, certiorari denied, 289 U. S. 758; *Davis v. Newton,* 6 Met. 537, 541; *Hooper et al. v. Bradford,* 178 Mass. 95, 97, Sec. 101 (c) (8) B has no application to this case. Personal property transmitted at death is not held by the representatives of the estate within the meaning of Sec. 101 (c) (8) B. The executor or administrator can only be said to hold it for the limited purpose of administration, or, as has been said, in *autre droit,* or as a *quasi* trustee for the benefit of the legatees, or heirs. *Lathrop v. Merrill,* 207 Mass. 6, 10.

In *Brewster v. Gage, supra,* the court said, p. 334:

> 'Immediately upon the death of the owner there vests in each of them (referring to a legatee or heir) the right to his distributive share of so much as shall remain after proper administration and the right to have it delivered upon entry of the decree of distribution * * *. Upon acceptance of the trust, there vests in the administrators or executors, as of the date of the death, title to all personal property belonging to the estate; it is taken, not for themselves, but in the right of others for the proper administration of the estate and for

First National v. U. S. continued.

> distribution of the residue. The decree of distribution confers no new right; it merely identifies the property remaining, evidences right of possession in the heirs or legatees and requires the administrators or executors to deliver it to them. The legal title so given relates back to the date of the death.'

It is clear that acquisition as used in these Acts means acquisition of title and not of possession.

As the Committee on Ways and Means pointed out in its report to the House No. 704 on the Revenue Act of 1934, with respect to the change in Sec. 113 (a) (5) of the pending bill from that of the Act of 1928:

> 'The change in the 1928 Act was made because there was some doubt as to the meaning of the term "acquisition," which was the term used in the Act of 1926. Since the 1928 Act was passed, the Supreme Court has defined the "date of acquisition" to mean the date of death in the case of all property passing by bequest, devise or inheritance, whether real or personal. (*Brewster v. Gage,* 280 U. S. 327). Sec. 113 (a) (5) of the bill conforms to the language contained in the Act of 1926, so that a uniform basis rule may be required in the case of property passing at death, whether real or personal.'

In the 1921 Act, Sec. 206 (a) (6), it was provided that to constitute capital assets, property must be 'acquired and held' for two years. In subsequent Acts the word 'acquired' has been omitted, the obvious reason is that the word 'acquired' was

First National v. U. S. continued.

surplusage, since, in general, property is held from the time it is acquired or one's ownership begins.

A comparison of corresponding sections in prior Acts: Sec. 206 (a) (6), and 202 (a) (3) of the 1921 Act; Secs. 208 (a) (8) and 204 (a) (5) of the 1924 Act; Secs. 208 (a) (8) and 204 (a) (5) of the 1926 Act, discloses that capital assets are determined by the time property is 'held', while gains and losses are computed from the value as a base at the time of acquisition, except in certain instances of an arbitrary fixing of the base value. It was not until the insertion of Sec. 113 (a) (5) in the 1928 Act that any change was made in the base for computing gains between personal property transmitted at death by special bequest and by residuary bequests.

It is significant, however, that even in para. (a) (5) of Sec. 113 of the 1928 Act, notwithstanding the arbitrary fixing of the base value as of the date of distribution in case of a residuary bequest, it is recognized that personal property transmitted at death is acquired either by will or by descent. It expressly provides, that 'If personal property is acquired by specific bequest,' etc., and 'in all other cases, if the property was *acquired either by will or intestacy.*' (Italics supplied).

Sec. 101 and Sec. 113 were enacted for entirely different purposes. The first defines capital assets and capital gains; the second defines the method of determining the amount of gains, whether capital gains or income. They are not interdependent in the sense that the date from which gains and losses are computed must in all cases be the same as when the property was acquired by the taxpayer.

In other words, Congress intended only by the

First National v. U. S. continued.

change in Sec. 113 (a) (5) of the 1928 Act to make clear the base value for determining gains and losses in case of property transmitted at death, because of some uncertainty which had arisen in the Administrative Bureau as to date of acquisition of such property. It, however, made no substantial change in Sec. 101 of that Act from the provisions of Sec. 208 (a) (8) of the 1926 Act for determining what are capital assets.

In view of the purpose, which has repeatedly been recognized both by the Administrative Bureau and the courts of allowing a gain from the sale of property held for more than two years to be taxed as a capital gain, we do not think a narrow construction should be given to any provision in the Revenue Acts that would tend to defeat such purpose, unless it clearly follows from the language used. It should not be done by implication as here contended by the government in construing Sec. 113 (a) (5) of the 1928 Act. It cannot be said to be a necessary implication that when Congress, in order to clarify some uncertainty as to the date of acquisition of residuary bequests, fixed the base date for computing gains in case of the sale of personal property so acquired as the date of distribution, it also intended thereby to limit the period during which such property was held. It is inconceivable, we think, that if Congress intended by Sec. 113 (a) (5) of the Act of 1928 to effect a change in the period during which the property acquired by will or inheritance must be held to constitute capital assets, it would not also have made an equally definite change in Sec. 101 of that Act.

There is nothing new in fixing an arbitrary date for determining the base value for computing gain

First National v. U. S. continued.

or loss in the sale of property and different from that when the property was acquired by the taxpayer. In case of property purchased prior to 1913, it was fixed as of March 1, 1913, unless the cost price was in excess of their value on that date; also see Sec. 208 (a) (8) of the 1926 Act, and see Sec. 113 (a) (1) (2) (3) (4) (6) of the 1928 Act.

We find nothing in the decisions in *Helvering v. New York Trust Co.*, 292 U. S 455, or *Helvering v. Bliss*, 293 U. S. 144, which modifies the rule laid down by the Supreme Court in *Brewster v. Gage, supra*, in construing the sections of the earlier Acts corresponding to Sec. 113 (a) (5). Under the rule laid down in *Brewster v. Gage, supra*, we think the petitioners acquired the *corpus* of the trust on April 4, 1926, and therefore held it more than two years prior to the sale, and that the District Court erred in holding that under the provisions of Sec. 101 (c) (8) B of the 1928 Act, the taxpayer had not held the securities sold since the death of the testator.

The gain of $74,773.08 resulting from the sale of securities by the trustees, therefore, should have been treated as a capital gain, and in order to determine the total amount to which the petitioners are entitled as a refund, the case must be remanded for a recomputation of the tax in accordance with this opinion.

The Judgment of the District Court is reversed and the case remanded to that court for further proceedings not inconsistent with this opinion."

Under the construction thus placed upon the Act of 1928, in the above opinion, petitioner's gain would be computed on the basis of time of distribution as already determined by the Commissioner and her holding period

for capital gain determination would begin from date of decedent's death.

We have nothing further to add to the sound reasoning of the First Circuit Court in *First National Bank v. United States, supra,* which they advanced to support their construction of the relevant sections of the Revenue Act of 1928 that under authority of *Brewster v. Gage, supra, the* legatee or distributee does not acquire title from the executor or administrator, but under the will or under the intestate laws, and his title vests as of the date of decedent's death; that acquisition as used in these Acts means acquisition of title and not of possession; that Sections 101 and 113 were enacted for entirely different purposes, the first defining capital assets and capital gains, and the second defining the method of determining the amount of the gains, whether capital gains or ordinary net income, and that these sections are not interdependent in the sense that the date from which gains and losses are computed must in all cases be the same as when the property was acquired by the taxpayer; that since the acquisition of the securities sold dates back to the death of decedent they were held more than two years and should be so treated in assessing the tax as a capital gain although the amount of the gain was properly determined under Section 113 (a) (5).

Nothing has been said by the Second or the Ninth Circuit Court or the Board of Tax Appeals which can be used to refute the sound reasoning and conclusions of the First Circuit Court, and we submit it is plainly evident that the decision of the Third Circuit Court of Appeals in the case at bar is against the weight of authority and in conflict with the applicable decisions of other Circuit Courts and of the Supreme Court of the United States.

We have advanced to the Respondent, without success, the equitable theory that the Estate of T. H. Given was in the process of administration from 1919 until 1925, when an account was filed and the audit thereon established that all the debts had been paid, except a disputed balance of the Pennsylvania inheritance tax, funds for which were on hand; that the parties in interest had elected to take in kind and had agreed to suspend distribution of a portion of the assets; that after the decree of distribution of May 20, 1925, the duties of the executors having been fulfilled, they became custodians of the assets which had been constructively distributed; that by the election to take in kind, petitioner's assets were earmarked and the executors as custodians were legally bound to account to her for them specifically.

In view of these facts and the additional strength of her position as the owner of a gift in 1924 of a vested interest, the value of which was recognized and taxed, we contend that petitioner's position is much stronger than that of a residuary legatee or beneficiary of an estate. She is clearly within the intention of Congress in the class of taxpayers, who having held property for a considerable period were to be taxed on their gain at a lower rate.

The Revenue Act of 1928 lays a tax on ordinary income and also lays an optional tax on capital net gain. Both taxes are a burden on a citizen and in seeking the proper construction of the tax on capital net gain, the taxpayer certainly is not seeking an exemption or a privilege, but asks for a construction of a section of the statute which will impose on her the lesser burden and she is entitled to the benefits of the principle of construction that taxing laws in case of ambiguity must be construed in favor of the taxpayer.

In *Gould v. Gould,* 245 U. S. 151, Mr. Justice McReynolds, delivering the opinion, says:

> "In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the government and in favor of the citizen."

The Revenue Act of 1928 should be construed in the broad comprehensive manner outlined in the *First National Bank of Boston v. United States, supra,* and we concur in what this Honorable Court has already said in *Helvering v. Bliss,* 293 U. S. 144, Mr. Justice Roberts delivering the opinion:

> "The exemption of income devoted to charity and *the reduction of the rate of tax on capital gains* were liberalizations of the law in the taxpayer's favor, were begotten from motives of public policy and are not to be narrowly construed." (Italics are ours).

Conclusion.

From the foregoing, we submit that the weight of authority supports our specifications that the Circuit Court of Appeals for the Third Circuit erred in affirming the Board of Tax Appeals' decision that the date which governs for gain or loss purposes must be used in fixing the date of acquisition for capital gain determination; that petitioner had not held the stock sold for more than two years from the date of distribution; that the stock was therefore not a capital asset and that the profit realized by her from the sale thereof was "ordinary net income", and the said Court further erred

in affirming the decision that the petitioner was therefore liable for an additional income tax of $35,312.53 for the year 1929.

Therefore your petitioner prays that the judgment of the Circuit Court of Appeals for the Third Circuit and the finding, decision and order of the Board of Tax Appeals in this cause be reversed and set aside and that this case be remanded for further proceedings consistent with the opinion of this Court, and that your petitioner have such other and further relief in the premises as to this Honorable Court may seem meet and just.

G. F. SNYDER,
707 Colorado Building,
Washington, D. C.

H. B. WASSELL,
3106 Grant Building,
Pittsburgh, Pa.,
Attorneys for Petitioner.

APPENDIX.

Sections of Statutes Involved.

REVENUE ACT OF 1928

45 STAT. 791-811.

SEC. 101. CAPITAL NET GAINS AND LOSSES.

C. Definitions.—For the purposes of this title—

* * * * * * * *

(c) (8) "Capital Assets" means property held by the taxpayer for more than two years * * * For the purposes of this definition—

* * * * * * * *

(B) In determining the period for which the taxpayer has held property however acquired there shall be included the period for which such property was held by any other person, if under the provisions of section 113, such property has, for the purpose of determining gain or loss from a sale or exchange, the same basis in whole or in part in his hands as it would have in the hands of such other person.

* * * * * * * *

45 STAT. 791-818.

SEC. 113. BASIS FOR DETERMINING GAIN OR LOSS.

(a) Property acquired after February 28, 1913.—The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property; except that—

* * * * * * * *

(2) Gift after December 31, 1920.—If the property was acquired by gift after December 31, 1920, the basis shall be the same as it would be in the hands of

the donor or the last preceding owner by whom it was not acquired by gift. * * *

(5) Property transmitted at death—If personal property was acquired by specific bequest, or if real property was acquired by general or specific devise or by intestacy, the basis shall be the fair market value of the property at the time of the death of the decedent. If the property was acquired by the decedent's estate from the decedent, the basis in the hands of the estate shall be the fair market value of the property at the time of the death of the decedent. In all other cases if the property was acquired either by will or by intestacy, the basis shall be the fair market value of the property at the time of the distribution to the taxpayer. * * *

* * * * * * * *

SEC. 168. CAPITAL NET GAINS AND LOSSES.

In the case of an estate or trust, or of a beneficiary of an estate or trust, the proper part of each share of the net income which consists, respectively, of ordinary net income, capital net gain, or capital net loss, shall be determined under rules and regulations to be prescribed by the Commissioner with the approval of the Secretary, and shall be separately shown in the return of the estate or trust, and shall be taxed to the beneficiary or to the estate or trust as provided in this Supplement, but at the rates and in the manner provided in section 101 (a) and (b), relating to capital net gains and losses.

REVENUE ACT OF 1926.

44 STAT. 9-19.

CAPITAL GAINS AND LOSSES.

SEC. 208 (a) For the purposes of this title—

* * * * * * * *

(8) The term "capital assets" means property held by the taxpayer for more than two years * * * In determining the period for which the taxpayer has held property however acquired there shall be included the period for which such property was held by any other person, if under the provisions of section 204 such property has for the purpose of determining gain or loss from a sale or exchange, the same basis in whole or in part in his hands as it would have in the hands of such other person. * * *

* * * * * * * *

(e) In the case of the members of a partnership, of an estate or trust, or of the beneficiary of an estate or trust, the proper part of each share of the net income which consists, respectively, of ordinary net income, capital net gain, or capital net loss, shall be determined under rules and regulations to be prescribed by the Commissioner with the approval of the Secretary, and shall be separately shown in the return of the partnership or estate or trust, and shall be taxed to the member or beneficiary or to the estate or trust as provided in sections 218 and 219, but at the rates and in the manner provided in subdivision (b) or (c) of this section.

REVENUE ACT OF 1926.

44 STAT. 9-14.

BASIS FOR DETERMINING GAIN OR LOSS, DEPLETION, AND DEPRECIATION.

SEC. 204 (a) The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property; except that—

* * * * * * * *

(2) If the property was acquired by gift after December 31, 1920, the basis shall be the same as it would be in the hands of the donor or the last preceding owner by whom it was not acquired by gift. * * *

* * * * * * * * *

(5) If the property was acquired by bequest, devise, or inheritance, the basis shall be the fair market value of such property at the time of such acquisition.

* * *

REVENUE ACT OF 1924.

43 STAT. 253-262.

SECTION 208 (a) For the purposes of this title

* * * * * * *

(a) (8) The term "capital assets" means property held by the taxpayer for more than two years.

* * * * * * * *

(b) In the case of any taxpayer (other than a corporation) who for any taxable year derives a capital net gain, there shall (at the election of the taxpayer) be levied, collected and paid, in lieu of the taxes imposed by Sections 210 and 211 of this title a tax determined as follows:

A partial tax shall first be computed upon the basis of the ordinary net income at the rates and in the man-

ner provided in Sections 210 and 211, and the total tax shall be this amount plus 12½ per cent of the capital net gain.

(c) In the case of the members of a partnership of an estate or trust, or of the beneficiary of an estate or trust, the proper part of each share of the net income which consists, respectively, of ordinary net income, capital net gain, or capital net loss, shall be determined under rules and regulations to be prescribed by the Commissioner with the approval of the Secretary, and shall be separately shown in the return of the partnership or estate or trust, and shall be taxed to the member or beneficiary or to the estate or trust as provided in Sections 218 and 219, but at the rates and in the manner provided in subdivision (b) and (c) of this section.

REVENUE ACT OF 1921.

42 STAT. 227-232.

SECTION 206 (a) That for the purpose of this title:

* * * * * * *

(a) (6) The term "capital assets" as used in this section means property acquired and held by the taxpayer for profit or investment for more than two years. * * *

42 STAT. 227-229.

Section 202 (a) That the basis for ascertaining the gain or loss sustained from the sale or other disposition of property real, personal or mixed, acquired after February 28, 1913, shall be the cost of such property, except that * * *

* * * * * * *

(3) In the case of such property, acquired by bequest, devise or inheritance, the basis shall be the fair market price or value of such property at the time of such acquisition.

REPORT NO. 960.

Report No. 960 of the Senate Committee on Finance on the Internal Revenue Bill of 1928, at page 26, contains the following:

The decision by the Court of Claims in *McKinney v. United States* has caused confusion in the existing law as to the basis on which an executor must determine gain or loss on the sale by him of property of the estate. The House bill in section 113 (a) (5) provides that in such cases the basis shall be the fair market value of the property at the time of the death of the decedent. In the same section the House bill provides the same basis shall be used where the property is sold by the beneficiary.

It appears that the House bill is inadequate to take care of a number of situations which frequently arise. For example, the executor, pursuant to the terms of the will, may purchase property and distribute it to the beneficiaries, in which case it is impossible to use the value at the decedent's death as the basis for determining subsequent gain or loss, for the decedent never owned the property. Moreover, the fair market value of the property at the decedent's death can not properly be used as the basis, in the case of property transferred in contemplation of death where the donee sells the property while the donor is living.

Accordingly, the committee has revised section 113 (a) (5) and certain related sections, so as to provide that in the case of a specific bequest of personalty or a general or specific devise of realty, or the transmission of realty by intestacy, the basis shall be the fair market value at the time of the death of decedent. In these cases it may be said, as a matter of substance, that the property for all practical purposes vests in the beneficiary immediately upon the decedent's death, and there-

fore the value at the date of death is a proper basis for the determination of gain or loss to the beneficiary. The same rule is applied to real and personal property transmitted by the decedent, where the sale is made by the executor. In all other cases the basis is the fair market value of the property at the time of the distribution to the taxpayer. The latter rule would obtain, for example, in the case of personal property not transmitted to the beneficiary by specific bequest, but by general bequest or by intestacy. It would also apply in cases where the executor purchases property and distributes it to the beneficiary.

REPORT NO. 1882.

Report No. 1882 of the Conference Committee, on the Revenue Bill of 1928, page 14, contains the following:

Section 113 (a) (5) is amended (No. 75) so as to provide that in the case of specific bequest of personalty or a general or specific devise of realty or the transmission of realty by intestacy the basis shall be the fair market value of the property at the time of the death of the decedent. In these cases it may be said, as a matter of substance, that the property for all practical purposes vests in the beneficiary immediately upon the decedent's death, and therefore the value at the date of death is a proper basis for the determination of gain or loss to the beneficiary. The same rule is applied to real and personal property transmitted by the decedent where the sale is made by the executor. In all other cases the basis is the fair market value of the property at the time of the distribution to the taxpayer. The latter rule would obtain, for example, in the case of personal property not transmitted to the beneficiary by specific bequest, but by general bequest or by intestacy. It would also apply in cases where the executor pur-

chases property and distributes it to the beneficiary; and the House recedes, with the following amendment:

A special rule is provided in section 113 (a) (5) by which to determine the basis of property transferred in trust with the right reserved to the grantor at all times prior to his death to revoke the trust where the sale or other disposition of property occurs after the death of the grantor. This rule includes sales or other dispositions by the trustees and also by a beneficiary of the trust. In view of the complete right of revocation in such cases on the part of the grantor at all times between the date of creation of the trust and his death, it is proper to view the property for all practical purposes as belonging to the grantor rather than the beneficiaries and to treat the property as vesting in the beneficiaries according to the terms of the trust instrument, not at the date of creation of the trust, but rather on the date of the grantor's death, for the purpose of determining gain or loss on sale or other disposition of the property after the grantor's death by the trustee or by a beneficiary. Accordingly, it is provided that the basis of such property in the hands of the persons entitled thereto by the terms of the trust instrument after the grantor's death shall be the same as if the trust instrument had been a will executed on the date of his death. Thus property acquired by virtue of revocable trusts of the kind described is treated, for all practical purposes, the same as though it had been transmitted by the grantor by will at his death.

Cf. Report No. 558, Senate Committee on Finance, Revenue Bill of 1934, p. 34;

Report No. 74, House Committee on Ways and Means, Revenue Bill of 1934, p. 28;

Report of the Joint Committee on Internal Revenue

Taxation, dated November 15, 1927, pp. 10, 17 and 40, *et seq.*;
Section 113 (2) (5), Revenue Act of 1934, 48 Stat. 706.

REPORT OF SENATE COMMITTEE—1934 BILL.

Report of Senate Committee on Finance on 1934 Revenue Bill contains the following:

Section 113 (a) (5) of the Revenue Act of 1932 is a reenactment of a similar provision contained in the 1928 act. The change in the 1928 act was made because there was some doubt as to the meaning of the term "date of acquisition," which was the term used under the Revenue Act of 1926. Since the 1928 act was passed, the Supreme Court has defined "the date of acquisition" to mean the date of death in the case of all property passing by bequest, devise, and inheritance, whether real or personal. (*Brewster v. Gage,* 280 U. S. 327). Section 113 (a) (5) of the House bill conforms to the language contained in the Revenue Act of 1926, so that a uniform basis rule may be required in the case of property passing at death, whether real or personal. The only change made by your committee to this paragraph of the House bill is to make it clear that if the property of the decedent is sold by the executor or other representative of the estate of the decedent, the basis for computing gain or loss from such sale is the fair market value at the date of death, which is the same basis adopted under the House bill when the property is sold by the beneficiary. The section also includes a provision relating to general powers of appointment exercised by will, which was explained in connection with section 113 (a) (4).

REPORT NO. 52 OF THE SENATE COMMITTEE.

Report No. 52 of the Senate Committee on Finance on the Internal Revenue Bill of 1926 contains the following at page 18:

Section 208 (a) (8): The 12½ per cent capital gain and loss provisions apply only to the sale or exchange of capital assets which have been held by the taxpayer for two years. Under the reorganization provisions many transactions are exempt from tax until the stockholder disposes of his stock received as a result of the reorganization. As a result of this fact the question frequently arises as to whether the period that the taxpayer held the stock which he exchanged for new stock should be added to the period for which he held his new stock, in order to determine whether or not he has held it for two years. The House bill incorporates in the law the present regulation of the Treasury and provides that these two periods shall be added for the purpose of determining the period during which the property sold was held for the purpose of determining both gain and loss under this section. The same question arises in the case of property received by gift after December 31, 1920. The House bill provides that the period for which the property was held by the donor shall be added to the period for which the property was held by the donee in determining whether or not the property so received falls within the capital gain or loss section.

The committee recommends a further provision that in determining the period for which the taxpayer has held stock or securities received upon a distribution where no gain is recognized to the distributee under section 203 (c) of this bill or the revenue act of 1924 there shall be included the period for which he held the stock or securities in the distributing corporation. Inasmuch as section 203 (c) in this bill and in the revenue act of

1924 is broad enough to include the case of stock dividends, the committee amendment takes care of the determination of the two-year period in the case of stock dividends, as to which the present Treasury regulations apply the same rule.

REPORT NO. 356, CONFERENCE COMMITTEE.

Report No. 356, the Conference Report on the Revenue Bill of 1926, at page 32, contains the following:

Amendment No. 10: The 12½ per cent capital gain and loss provisions apply only to the sale or exchange of capital assets which have been held by the taxpayer for two years. This amendment provides that in determining the period for which the taxpayer has held stock or securities received upon a distribution where no gain is recognized to the distributee under section 203 (c) of this bill or the revenue act of 1924, there shall be included the period for which he held the stock or security in the distributing corporation. Inasmuch as section 203 (c) in this bill and in the revenue act of 1924 is broad enough to include the case of stock dividends, this amendment takes care of the determination of the two-year period in the case of stock dividends as to which the present Treasury regulations apply the same rule; and the House recedes.